IN THE

SUPREME COURT OF THE UNITED STATES

May Term, 1956

No. .....

JAMES ROBERT PALMER and LENORE PALMER,
PETITIONERS:

vs.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on December 14, 1955.

Opinions Below

The opinion of the Circuit Court of Appeals, Tenth Circuit, is not yet reported, and is appended hereto as Appendix I together with the judgment of said Circuit Court of Appeals.

Jurisdiction

Judgment was entered against Petitioners on the 14th day of December, 1955, and no orders of any nature were entered respecting a rehearing. An extension of time in which to file Petition for Writ of Certiorari was entered by this Court on January 13, 1956, by the terms of which Petitioners were given to and including February 11, 1956, in which to file Petition for Writ of Certiorari.

The statutory provision believed to confer jurisdiction on this Court to review the judgments of the Circuit Court of Appeals is 28 U.S.C. 1254, by the terms of which the judgments of the Court of Appeals may be reviewed by means of Certiorari.

Questions Presented

The questions presented for review in this cause are as follows:

The only valid question presented for review in this case is as follows:

1. Did the trial Court commit error in allowing the Government to amend the information under Rule 7 (e) of the Federal Rules of Criminal Procedure, so as to change the specific act charged?

Statutory Provisions

The following statutes are involved in this case:

18 *U.S.C.* 1341: Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of fraud or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counter-

feit or spurious coin, obligation, security, or other article or anything represented to be or anything held out to be such counterfeit or spurious, for the purpose of executing such scheme or artifice or attempting so to do, so placed in any post office or other depositories for mail matter, any matter or thing whatever to be sent or delivered by the post office department, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned for not more than five years or both.

15 *U.S.C.* 77*q* (*a*)(1): It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or commerce in Interstate Commerce by the use of the mails, directly or indirectly, (1) To employ any device, security or artifice to defraud.

Rule 7 (*e*) *Federal Rules of Criminal Procedure*: The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the Defendant are not prejudiced.

Statement

Defendants in the District Court were charged jointly with the violation of 18 U.S.C. 1341, being mail fraud. The first count of the information alleges, among other things, that the Defendants devised, and intended to devise, a scheme to defraud purchases of chattel mortgages executed in their favor, and that in futherance of said scheme, negotiated a certain fraudulent chattel mortgage to the

Denver Motor Finance Company. It was represented that said chattel mortgage had been executed by one James K. Morris, on or about the first day of October, 1951, negotiated August 22, 1951, securing a principal balance of $1730.00 (Tr. 4). During trial, Plaintiff's Exhibit 1, being the said chattel mortgage, or a copy thereof, was offered into evidence by the Government. The exhibit showed that the chattel mortgage described in the information was in fact executed on the first day of August, 1951; was in the principal amount of $2,041.40; and that the monthly payments thereon were $113.41. Upon motion of the Government's attorneys, the District Court permitted an amendment of the information to conform to the exhibit (Tr. 78).

The jury found the Defendants guilty on count 1 of the information, and further, the Defendant, James Robert Palmer further guilty on counts 2, 3, 4 and 5 of the information. The defendant, James Robert Palmer, was sentenced to imprisonment for a period of three years upon each of counts 1, 2, 3, 4 and 5 of the information, it being ordered by the court that the terms of imprisonment upon count 2 should commence upon the expiration of the terms of imprisonment upon count 1, and that the terms of imprisonment upon counts 3 and 4 should run concurrently with the term of imprisonment on count 2; further, that the term of imprisonment on count 5 should run concurrently with the term of imprisonment on count 1.

The Defendant, Lenore Palmer, was placed on probation for a period of three years on her conviction of count 1 of the information term set forth.

Each of these convictions and judgments were upheld by the United States Circuit Court of Appeals, Tenth Circuit.

Federal Jurisdiction

The basis for the jurisdiction of the Federal Court in the first instance is that statute known as 18 U.S.C. 3231 by which the district courts are vested with jurisdiction to try all offenses against the laws of the United States.

POINTS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

A

In order for the general question, whether or not the allowance of the amendment under Rule 7 (e) was proper, we must of necessity determine the exact purpose of the law.

The early case of District of Columbia vs. Herlihy, 1 MacArthur, 466, 8 D.C. 466, holds that an amendment is proper when the house and street number were patently incorrect. There is little question that the rule gives great latitude to the Government in allowing amendments covering patent mistakes, and other certain descriptive averments. Likewise, the cases of the United States vs. Seagraves, 10 Fed. Sup. 424, and United States vs. Smith 107 Fed. Sup. 839, permit the amendments merely to clear up or define certain latent mistakes, but not to change any material allegations.

As the Court has stated in the early case of United States vs. Brown, Federal Cas. #14,666, 3 McLean, 233:

> "Where the prosecutor states the offense with greater particularity than he is bound to do, the proof must correspond to the averments."

Thus, we can see the great value of the rule in creating substantial justice. However, it should be pointed out that the very purpose of Rule 7 (e) is to make allowances for mistakes in the information. When the Court

speaks of substantial justice under the rule, they clearly must mean justice for both sides of the issue. The prosecutor is allowed great latitude in striking or adding, yet the rule must protect the defendant in every respect. *Any information* could be correct if it merely alleged the substantive law of the crime. However, that clearly is not the rule as has been applied by this Court.

Any material allegation in an information which is relied on by the defendant, a defense prepared, cannot be amended if justice is to be served. The trial merely becomes a fishing expedition for the Government; and as the facts develop the information is amended. Such action on the part of the Government makes it impossible to defend the original charge.

In order for the amendment under Rule 7 (e) to be valid, the Court must find that there was no new or different offense after the amendment. This the Court cannot do. If 'A' is accused of passing a fictitious check for ten dollars on May 3, the prosecutor has charged one specific act. If subsequently it appears that a fictitious check for twenty dollars was passed on January 3, a new and different offense is charged. Where the act itself is alleged, the act must of necessity become part and parcel of the substance of the crime. A defendant would not only be at a great disadvantage but would be unable to refute the information if the Court allowed the prosecution to prove an entirely different instrument than the one alleged.

In the case at bar, the Government had all the information at its disposal, yet it offered no reason, such as mistake or inadvertence, for the purported amendment.

The cases relied on by the Government are cases arising out of the war powers and clearly do not apply in the

instant case. See Frederick vs. United States, 163 Fed. 2nd, 536 (C.A. 9). Certiorari denied. 332 U.S. 775, United States vs. Peach Mountain Coal and Mining Company, 161 Fed. 2nd, 476 (C.A. 2).

The Court's attention is particularly called to the case of United States vs. Personal Finance Company of New York, 13 F.R.D. 306, and as can be seen readily, the attempted amendment in substance provided that the defendant failed to preserve for the life of the obligation certain books of accounts and records. The Court stated:

> "But Rule 7(2) plainly makes as a condition of permitting amendment to an information that no new or different offense be charged therein. The Government has failed to show that it comes within the rule. It has merely adverted to the stenographic burden which would attach to it were it required to file a superseding information. If the Amendment were here permitted, Rule 7 (e) would be emptied of meaning and defendant deprived of a right given it by the rule. * * * The elimination of technicalities does not require the obliteration of the rules."

Thus it can be seen that the Government is not entitled as a matter of right to file information of a very general nature merely stating a substantive crime, and then on the trial of the issue be allowed to determine what specific crime has been committed and to summarily amend the information to correspondence to the proof.

CONCLUSION

In conclusion, it is submitted that each question herein presented to this Honorable Court presents justification for the exercise of the Court's supervisory powers in determining the matters more fully. It is respectfully re-

quested that this Court issue its Writ of Certiorari for the further determination thereof.

SAMUEL D. MENIN
Counselor at Law
Denver, Colorado

JOHN J. GIBBONS,
Attorney for Petitioners.
Denver, Colorado,

APPENDIX

OPINION

[December 14, 1955]

Eugene H. Tepley (Roy O. Goldin was with him on the brief) for Appellants;

Donald E. Kelley, United States Attorney (Robert Swanson, Assistant United States Attorney was with him on the brief) for Appellees.

Before PHILLIPS, Chief Judge, HUXMAN, United States Circuit Judge and SAVAGE, United States District Judge.

SAVAGE, District Judge.

Appellants, James Robert Palmer and Lenore Palmer, were convicted on Count 1 of a five count information of using the mails in a scheme to defraud in violation of 18 U.S.C § 1341. Palmer was convicted on Counts 2, 3 and 4 of using the mails to defraud in the sale of securities in violation of 15 U.S.C. § 77q (a)(1), and also convicted on Count 5 of another violation of the mail fraud statute. Mrs. Palmer was placed on probation for a period of three years. Palmer was sentenced to a term of imprisonment of three years on each count, the sentence on Count 2 to run consecutively to the sentence imposed on Count 1 and the sentences on Counts 3 and 4 to run concurrently with the sentence imposed on Count 2 and the sentence on Count 5 to run concurrently with the sentence imposed on Count 1.

Appellants were charged in Count 1 with having devised a scheme and artifice to defraud purchasers of chattel mortgages executed in favor of James Robert Palmer and Lenore Palmer, doing business as Ace Motors, and to obtain money and property by false and fraudulent pretenses from such purchasers. It was alleged that, for the purpose of executing the fraudulent scheme, the appellants caused to be placed in the United States mail two certain notes and chattel mortgages which were false and fraudulent.

Appellants complain of their convictions on this count upon grounds that, (1) the evidence was insufficient, and (2) they were prejudiced by an amendment of the information permitted during the trial.

In the spring of 1951, Ace Motors, which was owned and operated by appellants at Pueblo, Colorado, entered into a floor plan mortgage agreement whereby Denver Motor Finance, Denver, Colorado, agreed to advance money for the purpose of financing Ace Motors' new car business. By the terms of the agreement Denver Motors Finance advanced money on the security of new cars purchased from the factory. When one of the cars on which money had been advanced was sold and a note and mortgage obtained from the purchaser, Denver Motor Finance would release the car and take an assignment of the note and mortgage from Ace Motors and apply the amount thereof to reduce its indebtedness. On August 22, 1951, Ace Motors caused an "Installment Sale Contract—Note and Mortgage" to be mailed to Denver Motor Finance at Denver, Colorado, which was purportedly executed by James K. Morris on August 1, 1951, covering a 1951 Hudson 4-door Sedan, Motor No. 4A95216, in the sum of $2,041.40, and assigned by Ace Motors to Denver Motor Finance on August 22, 1951. This instrument was fictitious and fraudulent and had been signed by Mrs. Palmer on

behalf of Ace Motors and acknowledged by Palmer. The car described in the mortgage had been sold by Ace Motors to one Leandro Mestas on June 27, 1951, who paid the full purchase price. Mestas had not mortgaged the car and was the owner at the time the Morris instrument was fabricated. Payments to be applied on the Morris note were sent to Denver Motor Finance by Ace Motors.

On October 4, 1951, Ace Motors caused a second "Installment Sale Contract—Note and Mortgage" to be mailed to Denver Motor Finance at Denver, Colorado. This instrument was purportedly executed by Anita Watkins and delivered on October 4, 1951, covering a 1951 Hudson 4-door Sedan, Motor No. 8A106228, in the sum of $2,000, and assigned on the same date by Ace Motors to Denver Motor Finance. It was also false and fraudulent. The car described had been sold by Ace Motors to one Byron A. Wydman on July 10, 1951. Wydman was the owner of this car at the time the Watkins instrument was fabricated. Palmer personally sold this car to Wydman, who obtained a loan from A. W. Otterstein on July 10, 1951, secured by a chattel mortgage on the car, and used the proceeds to complete payment. This chattel mortgage to Otterstein was executed in Palmer's office at the time of the sale. Payments on the Anita Watkins notes were made by Ace Motors. Anita Watkins was Lenore Palmer's name by a former marriage. To allay suspicions with respect to this transaction, Mrs. Palmer wrote a fictitious letter to herself signing it "Anita Watkins" and then forwarding it to Denver Motor Finance.

The elements of the offense charged in this count are the scheme to defraud or for obtaining money or property by means of false pretenses and the use of the mails for the purpose of executing such scheme. The evidence tended to establish that appellants devised a scheme to defraud Denver Motor Finance by delivery of fictitious notes

and chattel mortgages in order to procure the release of new cars from the floor plan mortgage. Both of the spurious chattel mortgages were mailed at Pueblo, Colorado, and received by Denver Motor Finance at Denver. The James K. Morris mortgage was acknowledged by Palmer as a notary Public, and the assignment was executed by Mrs. Palmer. The evidence of guilt of both appellants on Count One is overwhelming.

We find no merit in the contention that appellants were prejudiced by the amendment of the information during the trial to conform to the proof. It was alleged in the information as follows:

> "* * * that a certain chattel mortage executed by one James K. Morris, 205 Madison, Pueblo, Colorado, on or about the 1*st day of October* 1951, was a valid and subsisting chattel mortgage upon a 4-door sedan Motor No. 4A 95216, Serial No. 4A 95216; that James K. Morris had agreed to pay *$1730.00 to Ace Motors* in eighteen consecutive monthly installments of *$131.41* each beginning September 15, 1951, which said mortgage, on or about the 22nd day of August, 1951, was assigned to Denver Motor Finance * * * "

But the Morris mortgage received in evidence was to some extent at variance with the foregoing. The date of the purported execution was August 22, 1951, rather than October 1, 1951. The amount to be paid was $2,041.40 in 18 monthly installments of $113.41, instead of $1,730.00 in 18 monthly installments of $131.41. It was the order of the trial court permitting amendment of the information to accurately describe the Morris mortgage of which complaint is made.

Rule 7(e) of the Federal Rules of Criminal Procedure provides:

> "The court may permit an information to be amended at any time before verdict or finding if no

additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

The appellants argue that no offense was charged in the original information because it was impossible to assign on August 22, 1951, a mortgage which was not executed until October 1, 1951. They assert that the amendment resulted in an offense being stated where none had been stated before. But this argument is based upon a misconception of the offense charged in Count One. As heretofore observed, the two essential elements of the offense are the scheme to defraud and the use of the mails for the purpose of executing the fradulent scheme. Webb v. United States, 10 Cir., 191 F.2d 512.

An accurate description of the fictitious mortgages which were alleged to have been used in the scheme to defraud was not an essential ingredient of the offense charged. The amendment allowed by the court related only to the identity of the mortgage and not to the substance of the offense. The information as originally filed charged an offense, and the allowance of the amendment to conform to the proof did not effect any change in the offense charged. The case of United States v. Personal Finance Company of New York, S.D., N.Y., 13 F.R.D. 306, relied upon by the appellants is not in point. There the amendments to the information sought to be made, which the court would not permit, would have resulted in the charging of a different offense.

In addition, it is apparent that the appellants suffered no prejudice. The description of the Morris mortgage in the original information was sufficiently accurate to disclose its identity to appellants. The name and address of the purported mortgagor were correctly given; the car covered by the mortgage was properly described, including the motor and serial numbers, and the date of the assignment of the mortgage by appellants was cor-

rectly given. The appellants could not have been surprised, nor was any claim of surprise made. Under these circumstances we are entirely satisfied that the substantial rights of the defendants were not prejudiced by the amendment.

In Counts 2 to 5 inclusive, it was charged that Palmer devised a scheme to defraud purchasers and prospective purchasers of preferred stock of Ace Finance, Inc., a Colorado corporation, and to obtain money by false pretenses by making many false representations in an effort to persuade persons to purchase such preferred stock. Separate uses of the mail by deposit or mail matter in the postoffice at Pueblo, Colorado, addressed to persons who were solicited by Palmer were made the basis of these four counts.

Palmer does not contend that the evidence is insufficient to support his conviction on these counts, but he seeks reversal because of alleged errors by the trial court in the admission and exclusion of evidence and in the instructions to the jury. A brief summary of the evidence will suffice.

Palmer caused the Ace Finance, Inc. to be incorporated under the laws of Colorado in June of 1951, ostensibly for the purpose of engaging in the finance business. He became its president and general manager. In December of 1951, he caused an ad to be run in the Wichita Beacon, Wichita, Kansas, under the column "Money Wanted", promising to pay six per cent interest on investments in Ace Finance. Inquiries followed from persons desiring to make investments, some of which were answered by mail. Palmer thereafter personally called on prospects.

Among the misrepresentations made from time to time by Palmer were statements that each account was insured up to $10,000; that the current dividend was six per cent; that each investment was guaranteed by an agency of the federal government; that the sum of $25,-

000 was carried in a reserve to make refunds to investors who wanted their money back; that Ace Finance was audited every three months by the Controller of Currency of the State of Colorado; and that a small rubber stamp exhibited by him was proof that his company was under a $75,000 bond. In addition, false representations were made from time to time that various parties had invested in the preferred stock of Ace Finance. The only intended victim who actually succumbed was one Wells M. Coleman, of Russell, Kansas, who invested $6,000 in the preferred stock.

Palmer urges that the court erred in admitting Exhibit 7, a typewritten letter on the letterhead of Ace Finance bearing the typed signature "J. R. Palmer". This letter was mailed at Pueblo, Colorado, on January 14, 1952, addressed to Wells M. Coleman, Russell, Kansas, and received by the addressee. It was objected to on the ground that it was not shown that it was written by Palmer nor signed by him.

This letter was in reply to one written to Ace Finance asking for information. Coleman's inquiry was inspired by the ad inserted by Palmer in the Wichita Beacon. Palmer called on Coleman at his home to solicit an investment shortly after the letter was received. When Palmer was interrogated about the letter on cross examination, he apologized for one false statement contained therein. This contention by Palmer is based on the erroneous premise that the government had the burden of showing that he either personally signed the letter or posted it for mailing. It was not necessary to show that the letter was written, signed or posted by Palmer. It is enough if he, in carrying out the scheme to defraud, caused the letter to be mailed, and this fact, like any other, may be found from circumstances. Butler v. United States, 10 Cir., 53 F.2d 800. The mailing of this letter was essential to the proof of guilt on Count Two. The circumstances

in proof in the case warranted its admission by the court and a finding by the jury that Palmer caused the letter to be mailed. Complaint is made by Palmer of the admission in evidence of Exhibit 8, a blotter mailed from the office of Ace Finance, in Pueblo, Colorado, to Coleman, and Exhibit 11, a letter purportedly written by C. B. Parker, as secretary of Ace Finance, to Coleman congratulating him upon his investment, upon the ground that it was not established that these mailings were ascribable to Palmer. The short answer to this contention is that Palmer testified upon cross-examination that he had the girls in the office mail all letters and blotters which were received from Ace Finance by Mr. Coleman, Mr. Grewell, Mrs. Suhr and others.

It is next asserted that the court committed error in admitting into evidence Exhibits 2, 4 and 5, being certain records of the Wichita Beacon designed to prove the content of the Wichita Beacon ad and to show that Palmer caused the ad to be inserted and paid for it. These exhibits were produced and identified by Nathan Kobey, a Denver attorney and assistant secretary of the corporation which published the Wichita Beacon. Kobey testified that these records were made in the regular course of business. Objection to the admission of these exhibits was made upon grounds that they were not kept under the supervision and direction of the witness and that he had no personal knowledge of the making of the records. This argument is without merit. The records became admissible upon proof that they were made in the usual course of business. The lack of personal knowledge by the witness of the facts recorded and other circumstances may be shown to affect their weight. 28 U.S.C.A. §1732. Furthermore this evidence could not have been prejudicial. It was cumulative. A postoffice inspector testified that Palmer made an admission to him that he had caused the

ad in question to be placed in the Wichita Beacon and his testimony was not refuted by Palmer.

It is next argued that the court improperly excluded evidence pertaining to the amount of loss sustained by Ace Finance in a fire which occurred in November of 1952. An offer of proof was not made, and we do not know what loss would have been claimed had the testimony been admitted. The trial court properly ruled that this evidence was not material to any issue in the case. The misrepresentations alleged to have been made by Palmer with respect to the financial condition of the company pertained to its financial condition in the early months of 1952.

The propriety of admitting in evidence Exhibit 46 presents a more substantial question. This exhibit was a letter written on April 23, 1952, on stationery of Ace Finance to Mrs. Rainbolt. It was signed by William Davis, who had worked for Ace Finance for a period of about sixty days. It referred to some letters written by Mrs. Rainbolt in which she had said that she owned stock in Ace Finance, Inc. Davis says therein that he had checked the records and did not find that she had ever invested money in the company. Reference is then made to an indebtedness of Palmer and Mrs. Palmer to Mrs. Rainbolt in the sum of $15,000, which Palmer had apparently attempted to discharge by delivery of preferred stock of Ace Finance. Palmer is referred to as an employee and as the general manager of the company. Davis closes the letter by admonishing Mrs. Rainbolt not write any more letters about the company. It is urged that this letter was not shown to have been written by direction of Palmer, was not material to any issue in the case and was highly prejudicial.

The government suggests that the letter was admissible to show that the preferred stock issued to Mrs. Rainbolt had not been paid for, and that the only preferred stock of the company issued and outstanding was that of

Wells Coleman.

The amount of the preferred stock of Ace Finance, Inc. issued and outstanding was not a material issue in the case. In addition, there was no evidence tending to prove that the letter was written by Palmer or at his direction. The letter was inadmissible but a careful examination of the whole record convinces us that its erroneous admission was not prejudicial and does not warrant a reversal of the case. Rice v. United States, 10 Cir., 149 F.2d 601.

Complaint is made of certain instructions given to the jury. Counsel for appellants, in reply to an inquiry made by the trial court before the jury retired, stated that he had no objections to the instruction. Rule 30 of the Federal Rules of Criminal Procedure provides that "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *" The obvious purpose of the rule is to afford the judge an opportunity to correct erroneous instructions before the jury retires to consider its verdict. United States v. Furlong, 7 Cir., 194 F.2d 1. While the court will notice plain errors affecting substantial rights although not brought to the attention of the court, the belated objections made to the instructions, even if well founded would not justify a reversal of the case. Moreover, a careful consideration of the instructions in their entirety convinces us that they adequately state the law and the incorrectness of one paragraph or one phrase, standing alone, would not constitute reversible error. McFarland v. United States, U. S. App., D.C., 174 F.2d 538.

Palmer finally contends that Counts 2, 3, 4 and 5 are invalid as imposing unauthorized multiple penalties. It is well settled that each separate use of the mails in the execution of a scheme to defraud constitutes a separate

offense. Badders v. United States, 240 U.S. 391; Mitchell v. United States, 10 Cir., 142 F.2d 480. The same rule applies to the use of mails in a scheme to defraud in the sale of securities. Palmer cites and relies on the recent case of Bell v. United States, 349 U.S. 81. It was there held that the simultaneous transportation of more than one woman in violation of the Mann Act constituted only one offense and not a separate offense for each woman transported. The court's construction of the Mann Act in the Bell case obviously may not be regarded as a departure from the rule laid down in the Badders case in which the court dealt with the mail fraud statute.

The Judgments are AFFIRMED.

Judgment, Case No. 5113.

Nineteenth Day, November Term, Wednesday, December 14th, 1955.

Before Honorable Orie L. Phillips, Chief Judge, Honorable Walter A. Huxman, Circuit Judge, and Honorable Royce H. Savage, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that James Robert Palmer, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.